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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

IN RE: JUUL LABS, INC., MARKETING  
SALES PRACTICES AND PRODUCTS  
LIABILITY LITIGATION

Case No. 3:19-md-02913-WHO

**DEFENDANT JAMES MONSEES'  
NOTICE OF MOTION AND MOTION  
TO DISMISS TRIBAL BRIEFING  
BELLWETHER COMPLAINTS;  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT THEREOF**

### This Document Relates to:

Judge: Hon. William H. Orrick  
Date: To be set by the Court  
Time: To be set by the Court  
Ctrm: 2, 17th Floor

*Grand Traverse Band of Ottawa and Chippewa Indians v. Juul Labs, Inc., et al.*, Member Case No. 3:21-cv-04253

= and =

*Saint Regis Mohawk Tribe v. Juul Labs, Inc., et al.*, Member Case No. 3:20-cv-03985

## **NOTICE OF MOTION AND MOTION**

2 PLEASE TAKE NOTICE that on a date and time to be set by the Court, in the United  
3 States District Court, Northern District of California, located at 450 Golden Gate Avenue, 17th  
4 Floor, San Francisco, California 94102, and in the Courtroom of the Honorable William H.  
5 Orrick, Defendant James Monsees will and hereby does move pursuant to Rule 12(b)(6) of the  
6 Federal Rules of Civil Procedure for an order dismissing with prejudice several claims asserted in  
7 the tribal briefing bellwether complaints: *Grand Traverse Band of Ottawa and Chippewa Indians*  
8 *v. Juul Labs, Inc., et al.*, Member Case No. 3:21-cv-04253, Dkt. No. 1, and *Saint Regis Mohawk*  
9 *Tribe v. Juul Labs, Inc., et al.*, Member Case No. 3:20-cv-03985, Dkt. No. 16. Specifically,  
10 Monsees seeks dismissal of Grand Traverse Band of Ottawa and Chippewa Indians' RICO claim  
11 (Count I), negligence claim (Count III), and Michigan Consumer Protection Act claim (Count  
12 IV), and Saint Regis Mohawk Tribe's RICO claim (Count I) and civil conspiracy claim (Count  
13 V).

14 This Motion is based on this Notice of Motion, the Memorandum of Points and  
15 Authorities, requests for consideration of documents incorporated by reference and/or judicially  
16 noticed, the Motions to Dismiss filed by other Defendants in the case, and such additional  
17 evidence or argument as may be presented at or before the hearing on this matter.

19 | Dated: October 8, 2021

JAMES N. KRAMER  
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By /s/ James N. Kramer  
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## **ISSUES TO BE DECIDED**

1. Whether the Court should dismiss Saint Regis Mohawk Tribe's civil conspiracy claim (Count V) because New York law does not recognize an independent civil conspiracy cause of action;

2. Whether the Court should dismiss Tribal Plaintiffs' RICO claims because established Ninth Circuit precedent precludes governmental entities from recovering under RICO solely for government expenditures;

3. Whether the Court should dismiss Grand Traverse Band's negligence claim (Count III) for failure to plead a "present physical injury," as required under Michigan law;

4. Whether the Court should dismiss Grand Traverse Band’s Michigan Consumer Protection Act (“MCPA”) claim (Count IV) because the general transaction alleged in the Complaint is exempt from the MCPA.

## **MEMORANDUM OF POINTS AND AUTHORITIES**

## I. INTRODUCTION

Plaintiffs Grand Traverse Band of Ottawa and Chippewa Indians (“Grand Traverse Band”) and Saint Regis Mohawk Tribe (collectively, “Tribal Plaintiffs”) have sued James Monsees (“Monsees”) and other entities and individuals affiliated with Juul Labs, Inc. (“JLI”) for alleged violations of the Racketeer Influenced and Corrupt Organizations Act (“RICO”) and the New York and Michigan consumer protection statutes, as well as common law claims for negligence, nuisance, and civil conspiracy.<sup>1</sup>

Tribal Plaintiffs' complaints are near carbon copies of other pleadings the Court has already evaluated the sufficiency of in this MDL. Monsees is mindful of the Court's prior orders addressing several claims that are substantially similar to those asserted by Tribal Plaintiffs here against Monsees (notably, claims for negligence under New York law, public nuisance, civil conspiracy, and consumer protection statute violations under New York law).<sup>2</sup> Out of respect for the Court's time, but without waiving his right to challenge the sufficiency of those Tribal Plaintiffs' claims at a later date, this Motion does not re-brief those claims.<sup>3</sup>

<sup>1</sup> Monsees does not dispute that the Northern District of California may exercise personal jurisdiction over him. Nevertheless, pursuant to the Court’s Direct Filing Order, Monsees reserves all rights to challenge personal jurisdiction in the event that the case is remanded to Michigan and/or New York. See Second Amended Case Management Order No. 3 – Direct Filing Order, Dkt. No. 996 at 2:14-15 (“The parties reserve all rights with respect to . . . any post-remand jurisdictional . . . challenges or motions”).

<sup>2</sup> See Order on Substantive Motions to Dismiss, Dkt. No. 1084 (Oct. 23, 2020) (hereinafter “October 2020 Order, Dkt. No. 1084”); Order on Second Round of Motions to Dismiss, Dkt. No. 1694 (Apr. 13, 2021) (hereinafter “April 2021 Order, Dkt. No. 1694”); Order on Motions to Dismiss Personal Injury Bellwether Complaints, Dkt. No. 2144 (July 22, 2021) (hereinafter “July 2021 Order, Dkt. No. 2144”).

<sup>3</sup> As Monsees has previously argued with respect to substantially similar complaints, the allegations against him are insufficiently pled. Accordingly, Monsees respectfully preserves that argument, in addition to the arguments raised in his prior briefing, including his Motion to Dismiss Government Entity Complaints, Dkt. No. 779, and Reply in Support of Motion to Dismiss Government Entity Complaints, Dkt. No. 884. Monsees also joins in the arguments set forth in Defendant Adam Bowen’s concurrently filed Motion to Dismiss with respect to Tribal Plaintiffs’ failure to plead personal participation in any underlying tort.

1        Nevertheless, several of Tribal Plaintiffs' claims are wholly deficient for reasons not  
 2 previously considered by this Court and accordingly must be dismissed.

3        *First*, Saint Regis Mohawk Tribe's New York-based civil conspiracy claim must be  
 4 dismissed because, as this Court recognized in its July 2021 Order, New York law does not  
 5 recognize a stand-alone civil conspiracy claim. July 2021 Order, Dkt. No. 2144 at 23.

6        *Second*, Tribal Plaintiffs lack RICO standing because they fail to allege any injury to  
 7 "business or property" (18 U.S.C. § 1964(c)) and instead, premise their RICO injuries solely on  
 8 financial loss and unrecoverable government expenses. As this Court previously acknowledged,  
 9 binding Ninth Circuit precedent precludes governmental entities, like Tribal Plaintiffs, from  
 10 recovering for government expenditures where no damage to its physical property or business has  
 11 been pled. October 2020 Order, Dkt. No. 1084 at 72; *Canyon Cty. v. Syngenta Seeds, Inc.*, 519  
 12 F.3d 969, 976 (9th Cir. 2008) (hereinafter "*Canyon County*").

13        *Third*, Grand Traverse Band's Michigan-based negligence claim must be dismissed  
 14 because it does not plead any "present physical injury," as required under Michigan state law.  
 15 *Henry v. Dow Chem. Co.*, 473 Mich. 63, 75 (2005) (plaintiffs must allege "their claims arise from  
 16 present physical injuries" to state a negligence claim).

17        *Finally*, Grand Traverse Band's Michigan Consumer Protection Act ("MCPA") claim  
 18 against Monsees must be dismissed because the MCPA does not apply to the sale and marketing  
 19 of e-cigarette products (including JUUL), which are subject to extensive regulation and oversight  
 20 by the federal Food and Drug Administration ("FDA"). *Graham Med. Techs., LLC v. Vilex in*  
 21 *Tenn., Inc.*, No. 15-13372, 2016 WL 3072255, at \*2 (E.D. Mich. June 1, 2016) (MCPA exempts  
 22 claims where the "sale of [a product] . . . is regulated by the [FDA]").

23        Because these claims are unavailable as a matter of law, the pleading defects are  
 24 dispositive and the Court should dismiss Tribal Plaintiffs' RICO claims, the New York-based  
 25 civil conspiracy claim, the Michigan-based negligence claim, and the MCPA claim with  
 26 prejudice.

1       **II. BACKGROUND**

2           Tribal Plaintiffs' complaints attempt to tell a fictional story of an overt effort by  
 3 Defendants to engage in a coordinated scheme to defraud the public through the  
 4 misrepresentation of the risks associated with JLI's products through its marketing, product  
 5 labeling, and design.<sup>4</sup> All of the misconduct alleged by Tribal Plaintiffs—related to the  
 6 marketing, labeling, and design of ENDS products—is heavily regulated by the FDA, which is  
 7 authorized to “enforce[e] existing laws addressing e-cigarettes.” *See* SR Am. Compl. ¶¶ 259,  
 8 496, 498.

9           Moreover, despite Tribal Plaintiffs' overall attempt at framing Defendants as one  
 10 undifferentiated group, as it relates to Monsees, the Complaints plead only facts showing  
 11 Monsees engaging in ordinary, lawful business activity, *e.g.*, receiving results from consumer  
 12 research (GT Compl. ¶¶ 141, 253; SR Am. Compl. ¶¶ 143, 255), reviewing advertising materials  
 13 (GT Compl. ¶¶ 86, 305, 326; SR Am. Compl. ¶¶ 88, 307, 328), negotiating the acquisition of JLI  
 14 (GT Compl. ¶ 55; SR Am. Compl. ¶ 57), and providing direction on JLI's website (GT Compl.  
 15 ¶ 381; SR Am. Compl. ¶ 384).

16           Nowhere do Tribal Plaintiffs plead they suffered any damage to their property or business,  
 17 let alone anything even closely resembling physical injury. Instead, Tribal Plaintiffs allege that  
 18 Defendants (as an undifferentiated group) forced them to spend money on public services. *See*,  
 19 *e.g.*, GT Compl. ¶¶ 733, 740; SR Am. Compl. ¶¶ 736, 757 (alleging they have “been compelled to  
 20 redirect [their] limited resources” and “forced to go far beyond what a governmental entity would  
 21 be expected to pay to enforce the laws to promote the general health and welfare of its citizens”).  
 22 Specifically, Tribal Plaintiffs allege they have been “compelled” to spend money on and dedicate  
 23 resources to:

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24           <sup>4</sup> *See* Plaintiff Grand Traverse Band's Complaint (“GT Compl.”) ¶¶ 4-7; *see also* Plaintiff Saint  
 25 Regis Mohawk Tribe's Amended Complaint (“SR Am. Compl.”) ¶¶ 4-7. For example, Tribal  
 26 Plaintiffs allege that: “Defendants misrepresented and deceptively marketed the nicotine content  
 27 of JUUL products” (GT Compl. ¶ 913; SR Am. Compl. ¶ 931), “JUUL labels and advertisements  
 . . . marketed the product as an ‘alternative’ to cigarettes” (GT Compl. ¶ 248; SR Am. Compl.  
 28 ¶ 250), and Defendants “designed JUUL products to create and sustain addiction” (GT Compl.  
 ¶ 4; SR Am. Compl. ¶ 4).

- “[E]ducat[ing] their citizens of the true dangers of e-cigarettes” (GT Compl. ¶ 733; SR Am. Compl. ¶ 736);
- “[A]pplying for limited duration grants in order to advance tobacco control efforts” (GT Compl. ¶ 733; *see also* SR Am. Compl. ¶ 736);
- “Inreas[ing] security and monitoring protocols, disciplinary programs, educational programs, healthcare costs, and the costs of public health programs” (GT Compl. ¶ 860; SR Am. Compl. ¶ 877);
- “[M]itigation and remedial programs” (GT Compl. ¶ 862; SR Am. Compl. ¶ 879);
- “[H]ealthcare resources on addiction treatment and prevention programs” (SR Am. Compl. ¶ 749); and
- “Tribal Police,” who have “been involved with issues surrounding vaping” and “coordinating with Tribal Compliance on investigations of local retail stores and enforcement” (SR Am. Compl. ¶ 750).

Like other governmental entities, Tribal Plaintiffs are “responsible for the protection of public health and safety within [their] jurisdiction” and “provide[] essential services to [their] citizens.” GT Compl. ¶ 12; SR Am. Compl. ¶ 11. Tribal Plaintiffs only allege damages based *solely* on the purported economic hardship caused by a heightened need for public services.

### III. STANDARD FOR DISMISSAL

As the Court is aware, it must dismiss a cause of action under Rule 12(b)(6) if it lacks a “cognizable legal theory” or “sufficient facts alleged under a cognizable legal theory.” See *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1988). Every plaintiff bears the burden of alleging facts sufficient to “state a claim to relief that is plausible on its face,” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), and “raise a right to relief above the speculative level,” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007). In deciding whether the complaint states a claim upon which relief can be granted, the Court need not accept as true “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements.” *Iqbal*, 556 U.S. at 678. “[N]aked assertions’ devoid of ‘further factual enhancement’” and pleadings that “offer[] ‘labels or conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not

1 do.”” *Id.* (quoting *Twombly*, 550 U.S. at 555, 557).

#### 2 IV. ARGUMENT

3 As noted above, several of Tribal Plaintiffs’ claims fail as a matter of law and should be  
 4 dismissed. Specifically: (1) Saint Regis Mohawk Tribe’s civil conspiracy claim lacks a  
 5 “cognizable legal theory” because New York law does not recognize a stand-alone conspiracy  
 6 claim, *infra* § IV.A; (2) Tribal Plaintiffs lack standing to assert their RICO claims as they do not  
 7 allege injury to “business or property,” as required, *infra* § IV.B; (3) Grand Traverse Band fails to  
 8 plead a “present physical injury,” as required to sustain a negligence claim under Michigan law,  
 9 *infra* § IV.C; and (4) the challenged conduct in Grand Traverse Band’s MCPA claim is exempt  
 10 from the MCPA itself, *infra* § IV.D.

11       **A. Saint Regis Mohawk Tribe’s Civil Conspiracy Claim Must Be Dismissed  
 12 Because New York Law Does Not Recognize a Stand-Alone Civil Conspiracy  
 13 Claim.**

14       Saint Regis Mohawk Tribe asserts an independent civil conspiracy claim under New York  
 15 law. SR Am. Compl. ¶¶ 942-50. But, as the Court acknowledged in its July 2021 Order, New  
 16 York law does not recognize a separate and distinct cause of action for civil conspiracy. *See* July  
 17 2021 Order, Dkt. No. 2144 at 23 (dismissing stand-alone conspiracy claims under New York law  
 18 with prejudice); *see Carlson v. Am. Int’l Grp., Inc.*, 30 N.Y.3d 288, 310 (2017) (affirming  
 19 dismissal of independent civil conspiracy claim under New York law); *see also Williams v.  
 20 Williams*, 149 A.D.3d 1145, 1146 (N.Y. App. Div. 2017) (same). The legion of cases that have  
 21 consistently followed this rule leave no doubt that the proper disposition of an independent claim  
 22 for civil conspiracy under New York law is dismissal with prejudice at the pleading stage. *See*,  
 23 *e.g.*, *Awoshiley v. Beth Israel Med. Ctr.*, 81 A.D.3d 517, 518 (N.Y. App. Div. 2011) (dismissing  
 24 civil conspiracy claim at pleading stage); *Jebran v. LaSalle Bus. Credit, LLC*, 33 A.D.3d 424, 425  
 25 (N.Y. App. Div. 2006) (same); *Freyne v. Xerox Corp.*, 98 A.D.2d 965, 968 (N.Y. App. Div.  
 26 1983) (same).

27       Accordingly, Saint Regis Mohawk Tribe’s civil conspiracy claim (Count V) lacks a  
 28 “cognizable legal theory” (*Balistreri*, 901 F.2d at 699), and the Court should dismiss this claim  
 with prejudice. *See* July 2021 Order, Dkt. No. 2144 at 23.

1           **B.     Tribal Plaintiffs Lack RICO Standing Because the Complaints Do Not Plead**  
 2           **Any Injury to “Business or Property” and Increased Government**  
 3           **Expenditures Are Not a Cognizable RICO Injury in the Ninth Circuit.**

4           To have RICO standing, Tribal Plaintiffs must allege they suffered an injury to “business  
 5           or property.” *See* 18 U.S.C. § 1964(c); *City & Cty. of San Francisco v. Purdue Pharma L.P.*, 491  
 6           F. Supp. 3d 610, 648 (N.D. Cal. 2020) (hereinafter “*San Francisco*”). It is well-settled law in the  
 7           Ninth Circuit that “[w]hen a governmental body acts in its sovereign or quasi-sovereign capacity,  
 8           seeking to enforce the laws or promote the public well-being, it cannot claim to have been  
 9           ‘injured in its property’ for RICO purposes based solely on the fact that it has spent money in  
 10          order to act governmentally.” *Canyon County*, 519 F.3d at 976; *see also San Francisco*, 491 F.  
 11          Supp. 3d at 648 (same). Tribal Plaintiffs concede they are “federally-recognized sovereign Indian  
 12          Tribe[s]” (GT Compl. ¶ 19; SR Am. Compl. ¶ 18) with “inherent sovereignty over unlawful  
 13          conduct” relating to their territory (GT Compl. ¶ 25; SR Am. Compl. ¶ 27). *See Santa Clara*  
 14          *Pueblo v. Martinez*, 436 U.S. 49, 55 (1978) (“Indian tribes are ‘distinct, independent political  
 15          communities.’”). Accordingly, Tribal Plaintiffs must allege more than just government  
 16          expenditures to adequately plead a RICO injury.

17           Though Tribal Plaintiffs’ complaints are similar to pleadings previously before this Court  
 18          (specifically, the Public Entity Bellwether Plaintiffs’ complaints), with respect to their RICO  
 19          claims, there is one outcome determinative difference. *See* October 2020 Order, Dkt. No. 1084.  
 20          Unlike the Public Entity Bellwethers, whom this Court found had alleged “damage directly to  
 21          their physical property [including, for example, the] . . . disposal of hazardous waste” on and  
 22          “physical modifications to” Plaintiffs’ property, *id.* at 73, *nowhere* do Tribal Plaintiffs offer such  
 23          allegations. Tribal Plaintiffs’ allegations of their purported injuries are devoid of any reference to  
 24          “physical property” damage or to facts suggesting business harms. *See supra* § II. Thus, this  
 25          Court must “cut away” Tribal Plaintiffs’ RICO claims as they are deficient as a matter of law.  
 26          *See* October 2020 Order, Dkt. No. 1084 at 73 (suggesting need to “cut away” “a large segment”  
 27          of Public Entity Plaintiffs’ injuries absent direct damage to “their physical property”).

28           The Ninth Circuit’s decision in *Canyon County* controls here. 519 F.3d at 980. As this  
 29          Court previously explained, “[i]n that case, the County alleged that it was damaged by having to

1 spend millions of dollars on health care and criminal justice services for the illegal immigrants  
 2 who have been employed by the defendants in violation of federal law.” October 2020 Order,  
 3 Dkt. No. 1084 at 72. The Ninth Circuit rejected this argument, concluding “that the government  
 4 does not possess a property interest in the law enforcement or health care services that it provides  
 5 to the public; therefore a governmental entity is not ‘injured in its property’ when greater demand  
 6 causes it to provide additional public services of this type.” *Canyon County*, 519 F.3d at 977.

7 In an improper attempt to circumvent the Ninth Circuit’s holding, Tribal Plaintiffs allege  
 8 they have been “forced to go far beyond what a governmental entity would be expected to pay to  
 9 enforce the laws to promote the general health and welfare of its citizens in order to combat the  
 10 vaping crisis.” GT Compl. ¶ 740; SR Am. Compl. ¶ 757. But, as the Court recognized in its  
 11 October 2020 Order, this District has already flatly rejected this same argument. *See San*  
 12 *Francisco*, 491 F. Supp. 3d at 651 (“The Court therefore rejects any ‘extraordinary cost’  
 13 exception to RICO standing.”); *see also* October 2020 Order, Dkt. No. 1084 at 72-73  
 14 (acknowledging *San Francisco* rejected the distinction between extraordinary and ordinary  
 15 expenditures). Indeed, as explained in the October 2020 Order, *Canyon County* “established a  
 16 bright line rule that government entities may **never recover** for government expenditures when  
 17 acting to enforce the laws or promote the general welfare, even if those expenditures are the result  
 18 of a ‘man-made crisis’ unexpected in magnitude and of a scope far beyond typical government  
 19 expenditures.” October 2020 Order, Dkt. No. 1084 at 72-73 (summarizing holding in *San*  
 20 *Francisco*, 491 F. Supp. 3d at 650) (emphasis added); *San Francisco*, 491 F. Supp. 3d at 650  
 21 (“[G]overnmental entities cannot assert a RICO claim based on expenditures or services provided  
 22 in their sovereign or quasi-sovereign capacities” (emphasis added)). Thus, Tribal Plaintiffs’  
 23 attempt to distinguish between ordinary and extraordinary government expenditures fails.

24 Moreover, just as in *Canyon County* and *San Francisco*, the Complaints allege that Tribal  
 25 Plaintiffs were forced to “spend[] money on the provision of additional public services” as a  
 26 result of Defendants’ alleged misconduct. *Canyon County*, 519 F.3d at 976; *San Francisco*, 491  
 27 F. Supp. 3d at 649. In both of these cases, the plaintiffs claimed RICO injuries included increased  
 28 health care costs and the diversion of governmental resources. For example, in *San Francisco*,

1 the plaintiffs alleged a “decrease in funding available for San Francisco’s public services”  
 2 because “[funding] was diverted to other public services designed to address the opioid  
 3 epidemic.”<sup>5</sup> Likewise, the *Canyon County* plaintiff alleged it was “forced to spend money . . . to  
 4 provide public services,” including “law enforcement [and] health care services that it provide[d]  
 5 to the public.” 519 F.3d at 975-76. Similarly here, Tribal Plaintiffs claim that their  
 6 “governmental resources have been severely burdened” (GT Compl. ¶ 732; SR. Am. Compl.  
 7 ¶ 735) because they “ha[ve] been compelled to redirect [their] limited resources” to curb the  
 8 effects of the JUUL epidemic (GT Compl. ¶ 733; SR Am. Compl. ¶ 736). For example, Tribal  
 9 Plaintiffs argue they have spent money and resources on: “educat[ing] their citizens” (GT Compl.  
 10 ¶ 733; SR Am. Compl. ¶ 736), “addiction treatment and prevention programs” (SR Am. Compl. ¶  
 11 749), “increased security and monitoring protocols [and] disciplinary programs” (GT Compl. ¶  
 12 860; SR Am. Compl. ¶ 877), “mitigation and remedial programs” (GT Compl. ¶ 862; SR Am.  
 13 Compl. ¶ 879), “applying for limited duration grants . . . to advance tobacco control efforts” (GT  
 14 Compl. ¶ 733; *see also* SR Am. Compl. ¶ 736), and “healthcare . . . and . . . public health  
 15 programs” (GT Compl. ¶ 860).

16 As the allegations above make clear, all of Tribal Plaintiffs’ alleged injuries necessarily  
 17 arise from the Tribe’s performance of governmental functions. *See, e.g.*, SR Am. Compl. ¶ 22  
 18 (“The Tribe provides its members with a wide range of government services and programs,  
 19 including public safety and police services; education; a fire department; a tribal court; a health  
 20 clinic and various treatment programs; community and family services . . . and other programs  
 21 and services.”); *see also* GT Compl. ¶ 23 (similar). Thus, Tribal Plaintiffs “may not claim [those]  
 22 costs as damages to [their] property for purposes of civil RICO standing.” *Canyon County*, 519  
 23 F.3d at 979.

24 It is beyond dispute that in the Ninth Circuit, “[f]inancial loss alone . . . is insufficient” to  
 25 establish RICO standing. *Id.* at 975; *cf.* October 2020 Order, Dkt. No. 1084 at 73 (stating  
 26 Plaintiffs had standing because they alleged physical property damage—allegations which are

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27       <sup>5</sup> First Amended Complaint, *City and Cty. of San Francisco v. Purdue Pharma L.P. et al.*, Case  
 28 No. 3:18-cv-07591-CRB, Dkt. No. 128 (hereinafter “San Francisco FAC”), ¶ 851(a).

1 absent in the Complaints before the Court now). Because Tribal Plaintiffs have not alleged  
 2 anything other than pure financial loss and unrecoverable government expenses, under the plain  
 3 language of the RICO Act and controlling Ninth Circuit authority, the Court should dismiss  
 4 Tribal Plaintiffs' RICO claims.<sup>6</sup>

5       **C. Grand Traverse Band's Failure to Plead Any "Present Physical Injury"  
 6 Similarly Dooms Its Negligence Claim Under Michigan Law.**

7       For similar reasons, the Court should dismiss Grand Traverse Band's negligence claim, as  
 8 it fails to plead non-economic losses, which is required under Michigan law. "It has simply  
 9 always been the case in [Michigan] jurisprudence that plaintiffs alleging negligence claims must  
 10 [] show that their claims arise from present physical injuries." *Henry*, 473 Mich. at 75; *see also*  
 11 *Means v. U.S. Conf. of Catholic Bishops*, 836 F.3d 643, 653 (6th Cir. 2016) ("In Michigan  
 12 'present physical injury' is necessary to state a claim for negligence.").

13       As explained above, *supra* § IV.B, Grand Traverse Band only asserts economic losses.  
 14 Specifically, it alleges that, as a result of the alleged acts and omissions of Defendants, it has  
 15 incurred "substantial expense" (GT Compl. ¶ 860) and its "governmental resources have been  
 16 severely burdened by the nicotine addiction epidemic" (*id.* ¶ 732). But none of its alleged injuries  
 17 involve any "physical injury to person or property," as opposed to purely "economic" injury,  
 18 which Michigan law requires. *See Henry*, 473 Mich. at 78 ("A financial 'injury' is simply not a  
 19 present physical injury, and thus not cognizable under our tort system."); *see also Knight v.*  
 20 *Horace Mann Ins. Co.*, No. 08-10405, 2010 WL 1257332, at \*2 (E.D. Mich. Mar. 30, 2020)  
 21 ("Plaintiff's negligence claim is for economic losses, which Michigan Courts have made  
 22 unequivocally clear cannot be sustained under Michigan law.").

23       Nor can the allegation that "citizens of the Grand Traverse Band [have] become addicted  
 24 to JUUL products" save Plaintiff's claim. GT Compl. ¶ 727. Grand Traverse Band explicitly

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25  
 26       <sup>6</sup> Insofar as Tribal Plaintiffs seek relief under 18 U.S.C. § 1962(d) for conspiracy to violate RICO,  
 27 the Court must also dismiss this claim. GT Compl. ¶¶ 867-77; SR Am. Compl. ¶¶ 884-94.  
 28 "Plaintiffs cannot claim that a conspiracy to violate RICO existed if they do not adequately plead  
 a substantive violation of RICO." *Howard v. Am. Online*, 208 F.3d 741, 751 (9th Cir. 2000);  
*Blue Oak Med. Grp. v. State Comp. Ins. Fund*, 809 F. App'x 344, 346 (9th Cir. 2020).

1 concedes it is “not asserting claims that belong to its . . . individual tribal citizens or users based  
 2 on individual personal harm.” *Id.* ¶ 17. Instead, the Band seeks “damages for harm caused to the  
 3 Grand Traverse Band as a sovereign tribe.” *Id.*; *cf. In re Nat'l Prescription Opiate Litig.*, 458 F.  
 4 Supp. 3d 665, 693-94 (N.D. Ohio 2020) (analyzing present physical injury requirement under  
 5 Michigan negligence law and holding “[w]hile money may be considered property, that does not  
 6 convert [plaintiff county’s] economic injury into a physical injury to person or property”).  
 7 Because Grand Traverse Band has failed to plead any “present physical injury,” the Court should  
 8 dismiss its negligence claim.

9           **D.       The MCPA Bars Grand Traverse Band’s MCPA Claim.**

10           Grand Traverse Band’s MCPA claim is barred by the MCPA itself, which exempts from  
 11 liability any “transaction or conduct specifically authorized under laws administered by a  
 12 regulatory board . . . acting under statutory authority of this state or the United States.” Mich.  
 13 Comp. Laws § 445.904(1)(a). This liability exemption is a complete defense to the MCPA claim  
 14 because, as Plaintiff concedes, the marketing, labeling, and design of ENDS products is regulated  
 15 by (and thus, specifically authorized by) a comprehensive federal regulatory framework over  
 16 which the FDA has exclusive authority. *See* SR Am. Compl. ¶¶ 259, 496, 498 (conceding that the  
 17 FDA has the authority to “enforce[e] existing laws addressing e-cigarettes” and has in fact  
 18 exercised that authority with respect to JUUL products); *see Flanagan v. Altria Grp., Inc.*, No.  
 19 05-71697, 2005 WL 2769010, at \*7 (E.D. Mich. Oct. 25, 2005) (Because the defendant’s  
 20 “general transaction’ was the labeling and advertising of its cigarettes,” and because federal law  
 21 “establishes a comprehensive Federal program to deal with cigarette labeling and advertising,”  
 22 the defendant’s conduct was exempt from the MCPA).

23           Michigan courts broadly construe the exemption for transactions and conduct authorized  
 24 by administrative agencies, and consistently hold that it applies whenever a “general transaction  
 25 is specifically authorized by law, regardless of whether the specific misconduct alleged is  
 26 prohibited.” *Smith v. Globe Life Ins. Co.*, 460 Mich. 446, 465 (1999). Specifically, Michigan  
 27 courts have held that the MCPA does not apply to highly regulated business practices, including,  
 28 for example, prescription drug advertising (*Duronio v. Merck & Co., Inc.*, No. 267003, 2006 WL

1 1628516, at \*6 (Mich. Ct. App. June 13, 2006)), operation of slot machines (*Kraft v. Detroit*  
 2 *Entm't, LLC*, 261 Mich. App. 534, 542 (2004)), and manufacture of prosthetic knee devices  
 3 (*Peter v. Stryker Orthopaedics, Inc.*, 581 F. Supp. 2d 813, 816 (E.D. Mich. 2008)).

4 The gravamen of Grand Traverse Band's MCPA claim is that Defendants deceptively  
 5 sold, marketed, labeled, and designed JUUL products to the Grand Traverse Band and their  
 6 citizens. *See, e.g.*, GT Compl. ¶ 913 (“Defendants misrepresented and deceptively marketed the  
 7 nicotine content of JUUL products.”); *id.* ¶ 248 (“JUUL labels and advertisements . . . marketed  
 8 the product as an ‘alternative’ to cigarettes.”); *id.* ¶ 4 (Defendants “designed JUUL products to  
 9 create and sustain addiction.”); *see generally supra* § II.

10 Yet, all of this challenged conduct is subject to a complex regulatory framework solely  
 11 within the FDA's authority. The federal Tobacco Control Act (“TCA”) delegates comprehensive  
 12 authority to the FDA to regulate numerous aspects of tobacco products (including JLI's  
 13 products<sup>7</sup>), such as their labeling, marketing, and “product standards,” as well as all aspects of  
 14 “modified risk tobacco products.” *See* 21 U.S.C. §§ 387a, 387b, 387c, 387g, 387k; *see* GT  
 15 Compl. ¶ 622. Under federal law, “labeling” includes “all labels and other written, printed or  
 16 graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such  
 17 article,” 21 U.S.C. § 321(m), and “product standards” encompasses rules regarding “nicotine  
 18 yields” and the “construction, components, ingredients, additives . . . and properties of the  
 19 tobacco product,” 21 U.S.C. §§ 387g(a)(4)(A)(i), (a)(4)(B)(i). In other words, the “FDA  
 20 regulates the manufacture, import, packaging, labeling, advertising, promotion, sale, and  
 21 distribution of ENDS” products, which includes all of JLI's products. *See Vaporizers, E-*  
 22 *Cigarettes, and other Electronic Nicotine Delivery Systems (ENDS)*, U.S. FOOD & DRUG ADMIN.,  
 23 <https://bit.ly/3CRLl5C> (last visited Oct. 7, 2021). Accordingly, the MCPA's liability exemption  
 24 prohibits Plaintiff's claim.

25  
 26  
 27 <sup>7</sup> In August 2016, the FDA promulgated its Deeming Rule, which designated ENDS (including  
 28 JUUL products) subject to the TCA and FDA regulation. *See* 81 Fed. Reg. 28973; *see* GT  
 Compl. ¶ 623.

1       *Flanagan v. Altria Group, Inc.* is instructive. 2005 WL 2769010, at \*1. In *Flanagan*, the  
 2 plaintiff alleged that cigarette manufacturers violated the MCPA by engaging in deceptive and  
 3 misleading conduct by labeling and promoting cigarettes marketed as “light.” *Id.* at \*1, 7.  
 4 Analyzing Michigan law, the court held that the “general transaction” at issue in the plaintiff’s  
 5 MCPA claim was the labeling and advertising of tobacco products, which was highly regulated  
 6 by a federal agency and therefore exempt from the MCPA. *Id.* at \*7.

7       Similarly, in *Short v. Janssen Pharms., Inc.*, the court assessed the viability of an MCPA  
 8 claim against a pharmaceutical company premised on an alleged unlawful marketing scheme.  
 9 No. 1:14-cv-1025, 2015 WL 2201713, at \*5 (W.D. Mich. May 11, 2015). There, similar to  
 10 Plaintiff’s allegations here, the complaint asserted that “Defendants allegedly knew that one of its  
 11 drugs . . . posed certain health risks to children,” but “[d]espite this alleged knowledge,  
 12 Defendants allegedly instructed its sales representatives to market [the drug] . . . as a safe and  
 13 effective treatment for various adolescent disorders.” *Id.* at \*1. In dismissing the plaintiff’s  
 14 MCPA claim at the pleading stage, the court concluded that the defendant’s activities were  
 15 exempt from MCPA liability because the FDA regulated those marketing activities. *Id.*

16       Similar to the claims asserted in *Flanagan* and *Short*, there is simply no support for the  
 17 proposition that Defendants’ highly regulated activity—marketing, designing, and labeling ENDS  
 18 products—falls within the type of activities subject to the MCPA. *See Duronio*, 2006 WL  
 19 1628516, at \*7 (MCPA exemption prohibits claims alleging misrepresentations related to the  
 20 safety and efficacy of prescription drugs because the Food, Drug, and Cosmetic Act “governs  
 21 drug marketing, manufacturing, and distribution” and “[t]he regulations implementing the [Act]  
 22 are extensive and detailed, and specifically regulate prescription drug advertising”).

23       Because Plaintiff’s MCPA claim is based entirely on the sale, marketing, labeling, and  
 24 design of JUUL products—*i.e.*, conduct “specifically authorized” and regulated by a federal  
 25 agency—no amendment could possibly cure this legal defect. *Gregorio v. Ford Motor Co.*, 522  
 26 F. Supp. 3d 264, 275 (E.D. Mich. 2021) (dismissing MCPA claim at pleading stage because  
 27 manufacture, sale, and lease of automobiles were specifically authorized under state and federal  
 28 law, and thus exempted from the MCPA); *Gant v. Ford Motor Co.*, 517 F. Supp. 3d 707, 720

1 (E.D. Mich. 2021) (same). Accordingly, the Court should dismiss the MCPA claim without leave  
2 to amend.

3 **V. CONCLUSION**

4 For the foregoing reasons, the Court should dismiss the Tribal Plaintiffs' RICO claims,  
5 Saint Regis Mohawk Tribe's civil conspiracy claim (Count V), and Grand Traverse Band's  
6 MCPA claim (Count IV) and negligence claim (Count III) without leave to amend.  
7

8 Dated: October 8, 2021

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